

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs (pre-1965)

1958

George H. Stevens et al v. Ralph C. Memmott et al : Brief of Plaintiffs and Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Thomas S. Taylor; Attorney for Plaintiffs and Appellants;

Recommended Citation

Brief of Appellant, *Stevens v. Memmott*, No. 8700 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/2856

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

MAY 3 1958

LAW LIBRARY

**In the Supreme Court of the
State of Utah**

FILED

FEB 5 - 1958

GEORGE H. STEVENS, et al,
Plaintiffs and Appellants,

vs.

RALPH C. MEMMOTT, et al,
Defendants and Respondents.

Clerk, Supreme Court, Utah

**CASE
NO. 8700**

Brief of Plaintiffs and Appellants

THOMAS S. TAYLOR,
Attorney for Plaintiffs
and Appellants,
55 East Center St.,
Provo, Utah

NEW CENTURY PRINTING CO., PHOTO. UTAH

INDEX

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	10
ARGUMENTS:	

POINT I

THE COURT ERRED IN ALLOWING DEFENDANTS TO AMEND THEIR SECOND AMENDED ANSWER AND COUNTERCLAIM SO AS TO BRING BEFORE THE JURY THE ISSUE OF PLAINTIFFS' CLAIM RED ROBIN A WHICH HAD PREVIOUSLY BEEN ADMITTED VALID IN PRE-TRIAL; BY REASON OF DEFENDANTS' TOP FILING PLAINTIFFS' RED ROBIN A AFTER SUIT HAD COMMENCED; RIGHTS TO BE DETERMINED WERE THE RIGHTS THAT EXISTED AT TIME SUIT WAS COMMENCED 13

POINT II

THE COURT ERRED IN ALLOWING DEFENDANTS TO AMEND THEIR SECOND AMENDED ANSWER AND COUNTERCLAIM TO BRING BEFORE THE COURT THE ISSUE OF PLAINTIFFS' CLAIM DRAKE NO. 3 AND DEFENDANTS' CLAIM BLACK LAVA NO. 1 WHICH WAS LOCATED BY DEFENDANTS ON TOP OF PLAINTIFFS' CLAIM AFTER THE LAW SUIT WAS COMMENCED AND WHEN DEFENDANTS HAD ACTUAL KNOWLEDGE OF PLAINTIFFS' VALID CLAIM..... 15

POINT III

THE COURT ERRED IN REFUSING PLAINTIFFS' MOTION TO AMEND THE PRE-TRIAL OR-

INDEX (Continued)

Page

DER AND PLAINTIFFS' AMENDED COMPLAINT TO PUT BEFORE THE COURT AND JURY THE ISSUE OF THE PHYSICAL LOCATION OF THE BLACK DRAGON NO. 5 MINING CLAIM; THAT IT WAS IN FORCE AND EFFECT AT THE TIME DEFENDANTS LOCATED THEIR CINDER CRATER NO. 14 CLAIM; THAT CINDER CRATER NO. 14 WAS THEREFORE INVALID AT THE TIME PLAINTIFFS LOCATED THEIR DRAKE NO. 1 AND NO. 8. THE COURT ERRED IN FAILING TO MAKE A FINDING OF FACT AS TO THE PHYSICAL LOCATION OF BLACK DRAGON NO. 5 AND THAT THE UNCONTROVERTED EVIDENCE WAS TO THE EFFECT THAT BLACK DRAGON NO. 5 WAS THE SAME PHYSICAL LOCATION OF CINDER CRATER NO. 14; THAT PLAINTIFFS' CLAIM DRAKE NO. 1 AND NO. 8 WERE VALID BECAUSE OF THE INVALIDITY OF CINDER CRATER NO. 14..... 16

POINT IV

THE COURT ERRED IN ITS FAILURE TO INSTRUCT JURY UPON THE UNCONTROVERTED EVIDENCE THAT THERE WAS SUFFICIENT LABOR PERFORMED ON PLAINTIFFS' CLAIM RED ROBIN A DURING THE SPRING OF 1956, PRIOR TO THE LOCATION OF DEFENDANTS' CLAIM RED HILL NO. 1..... 18

POINT V

THE COURT ERRED IN REFUSING TO ALLOW INTO EVIDENCE AS AN EXHIBIT THE SURVEYOR'S MAP MADE BY MR. A. R. SHELTON, ILLUSTRATING THE CLAIMS IN ISSUE AND THE WORKINGS AND IMPROVEMENTS ON THE SAME CLAIMS AS OF THE DATE OF THE SURVEY.

INDEX (Continued)

	Page
THE COURT ERRED BY UNDUE INTERFERENCE WITH THE DIRECT EXAMINATION OF MR. A. R. SHELTON WHICH DISCREDITED THE WITNESS IN THE EYES OF THE JURY.....	20

POINT VI

THE COURT ERRED IN RULING THAT BLACK DRAGON CLAIM NO. 6 WAS INVALID AT THE TIME DEFENDANTS LOCATED THEIR CLAIM CINDER CRATER NO. 14 BY REASON OF THE FAILURE OF THE OWNERS OF SAID BLACK DR- AGON NO. 6 TO FILE AN AFFIDAVIT OF LABOR OR A NOTICE OF INTENTION TO HOLD FOR THE ASSESSMENT YEAR ENDING JULY 1, 1947, OR BETWEEN JULY 1, 1947, AND JULY 23, 1947, THE DATE OF THE LOCATION OF CINDER CRATER NO. 14 BY DEFENDANTS.....	22
---	----

POINT VII

THE COURT IMPROPERLY REFUSED PLAIN- TIFFS' MOTION FOR EITHER THE COURT OR THE JURY TO VIEW THE PREMISES EITHER AS TO ALL THE CLAIMS IN DISPUTE OR AS TO CIN- DER CRATER NO. 13, NO. 14, DRAKE NO. 1 AND NO. 8	27
--	----

POINT VIII

DEFENDANTS WILFULLY MISREPRESENTED MATERIAL FACTS RELATING TO ASSESSMENT WORK ON THE CLAIMS CINDER CRATER NO. 13 AND NO. 14; THE COURT ERRED IN FAILING TO INSTRUCT THE JURY UPON THE PREPONDER- ANCE OF THE EVIDENCE IN FAVOR OF PLAIN- TIFFS ON THE ISSUES OF THE CLAIMS RED RO- BIN A, RED ROBIN, DRAKE NO. 1 AND DRAKE NO. 8	29
--	----

INDEX (Continued)

	Page
CONCLUSION	31

AUTHORITIES CITED

Aluman vs. Hooper, Wash. 79 P. 953.....	14
American Jurisprudence:	
50 Am. Jur. 49, No. 27.....	23
50 Am. Jur. 53, No. 32.....	23
53 Am. Jur. 315, No. 442.....	28
Cain vs. Addenda Mining Company, 15 A.L.R. 942....	24
Corpus Juris Secundum:	
No. 74	14
No. 145	14
No. 95	14
Donoghue vs. Tonopah Oriental Mining Co., Nevada, 198 P. 553, 15 A.L.R. 937.....	24
Healy vs. Rupp, Colo. 86, P. 1015.....	13
Morgan vs. Sorenson, Utah, 286 P.2d 229.....	25
Murray Hill Mining and Mill Company vs. Hanover, Utah, 66 P. 762.....	24
Nichols Applied Evidence, Vol. 3, Page 2975, No. 7....	21
P. A. Sorenson Company vs. Denver & R. G. R. Com- pany, Utah, 164 P. 1020.....	27
Royston vs. Miller, 15 A. L. R. 942.....	26

STATUTES

Title 78-40-4, U. C. A. 1953.....	14
Rule 47 "j", Utah Rules of Civil Procedure.....	27

14
3

In the Supreme Court of the State of Utah

GEORGE H. STEVENS, et al,
Plaintiffs and Appellants,

vs.

RALPH C. MEMMOTT, et al,
Defendants and Respondents.

**CASE
NO. 8700**

Brief of Plaintiffs and Appellants

STATEMENT OF FACTS

In studying this brief, plaintiffs respectfully request the Court to refer constantly to Plaintiffs' Exhibit No. 11, and Defendants' Exhibit No. 10, which are illustrations of the numerous claims in issue which will enable the Court to visualize the issues involved.

Plaintiffs commenced this action to quiet title to certain placer mining claims located about 8 miles west of Fillmore, Utah, whose principal value is that of volcanic ash and cinders which is primarily used to make building

blocks, poultry liter, and insulation. The plaintiffs brought an action to quiet title to these certain mining claims which are in direct conflict with those claimed by the defendants. Plaintiffs' appeal from the judgment of the lower court as to their placer mining claims known as Drake 1, Drake 8, Red Robin, and Red Robin A claims which, respectively, are in direct conflict with the defendants' claims known as Cinder Crater 14, Cinder Crater 13, and Red Hill No. 1.

Prior to the location of the above claims by either party herein, certain mining claims known as Black Dragon Nos. 4, 5 and 6 were validly located on the same ground at issue. These claims were all located October 27 and 28, 1937 (Defendants' Exhibit 58). Plaintiff Von Utley was present at the time these claims were located; he performed some of the work in building the discovery monuments and the corner monuments to locate said claims. At the request of one of these original locators, to-wit, Vern Smith, Mr. Utley placed the location notice of Black Dragon No. 5 in the discovery monument after Mr. Utley witnessed Mr. Smith fill said location notice out, at the direction of Mr. Smith (Tr. 133). The notice of location for Black Dragon No. 5 is that of a metes and bounds description commencing at the discovery monument (Defendants' Exhibit 58, page 5). The annual assessment work was performed on the Black Dragon Claims Nos. 1-6 each year to and including June 30, 1942 (Defendants' Exhibit 58). That subsequent to June 30, 1942, to and including June 30, 1947, the original locators and their successors in interest filed Notices of Intention to Hold instead of performing the annual labor on Black Dragon Claims 1 through 5 in accordance with the Congressional Act authorizing the suspension of annual labor on mining claims during the

war. The Congressional Act is that of H. R. 2370 Bill approved May 3, 1943 (Defendants' Exhibit 58). The last Notice of Intention to Hold filed for Black Dragon 6 was for the assessment year July 1, 1941, to July 1, 1942.

Defendants located their Cinder Crater Claims as follows:

Cinder Crater 5, March 5, 1947 (Answer and Counter-claim)

Cinder Crater 13, July 28, 1947 (Defendants' No. 3)

Cinder Crater 14, July 28, 1947 (Defendants' No. 2)

AT THE TIME OF THE LOCATION OF CINDER CRATER NOS. 5, 13, AND 14, THE BLACK DRAGON CLAIMS 1 THROUGH 5 WERE VALID MINING CLAIMS IN FULL FORCE AND EFFECT, AND DEFENDANTS CLAIM CINDER CRATER NO. 14 WAS NOT A VALID LOCATION IN THAT THERE WAS AN EXISTING VALID MINING CLAIM ON THE SAME GROUND.

The following is a chart summarizing the mining claims in direct conflict of the respective parties herein and the times of their location in order of the date of their location:

Black Dragon No. 4—Located 10-27-37 by Plaintiffs' predecessor in title, annual notices filed until 7-1-48.

Defendants' Cinder Crater No. 5—Located 3-5-47.

Plaintiffs' Red Robin—Located 6-22-50 and Red Robin A located 1-22-53.

Defendants' Red Hill No. 1—Located 9-27-56—after suit commenced.

Black Dragon No. 5—Located 10-28-37—Annual notices filed until 7-1-48.

Defendants' Cinder Crater No. 14—Located 7-28-47.

Plaintiffs' Drake No. 1—Located 7-8-52, and Plaintiffs' Drake No. 8, located 7-14-55.

Black Dragon No. 6—Located 10-29-37.

Amended 6-29-39, and increased in size to include Black Dragon No. 5.

Annual Notices filed until 7-1-42.

Defendants' Cinder Crater No. 14—Located 7-28-47.

Plaintiffs' Drake No. 1—Located 7-8-52.

Plaintiffs' Drake No. 8—Located 7-14-55.

During the course of the pre-trials of this case, it was conceded by defendants that their claim Cinder Crater No. 5 was not a valid claim for the reason that they located their claim at a time when Black Dragon No. 4 was a valid mining claim in force and effect upon the same ground. With full knowledge of plaintiffs' claim to this ground and after suit was commenced, defendants top filed defendants' Red Robin and Red Robin A claims with their claim Red Hill No. 1 on 9-7-56 (Defendants' Exhibit No. 10).

Prior to the location of Red Hill No. 1 by defendants, plaintiffs had been mining the same ground, their claim known as Red Robin A (Tr. 111) (Tr. 214, 215).

The uncontradicted evidence discloses that plaintiff Von Utey was present at the time the old mining claim Black Dragon No. 5 was located and assisted in its location; that he knows the exact location of said claim which is described by metes and bounds description (Tr. 133); that Mr. Utey used the same monuments as the old Black Dragon No. 5 in locating his claim Drake No. 1 (Tr. 174, 175). Mr. Shelton, a mining engineer and licensed surveyor, discovered the original Notice of Location of the Black Dragon No. 5 in a monument located on the Plaintiffs' claim

Drake No. 1 and No. 8 (Tr. 90). That the mining claim Black Dragon No. 5 was in force and effect at the time defendants located their Cinder Crater No. 14 (Defendants' Exhibit 58); that Black Dragon No. 6 was in force and effect at the time defendants' Cinder Crater No. 14 was located, which invalidated defendants' location of Cinder Crater No. 14 and left the ground open for plaintiffs to locate their Drake No. 1 and Drake No. 8 upon the same ground (Defendants' Exhibit 58, Defendants' Exhibit 11, Plaintiffs' Exhibit 10). The jury found that the defendant had constructed a road for his assessment work for the year ending July 1, 1952 and July 1, 1953, as illustrated by a red pencil line on Defendants' Exhibit 11, between the letters B and C on said exhibit (Tr. 288). That it required 1½ days work to construct the road between the letters B and C as illustrated on Defendants' Exhibit 11 (Tr. 290). The area in which defendants claim the road was built near the south boundary of their Cinder Crater 13 was an area in which defendants had no valid claim whatsoever; that it belonged to a third party, and the District Court for Millard County rules that defendants did not have title to the area in which the road was built and never had title to said ground (Tr. 263). Assuming that defendants did build this road, which plaintiffs claim is fictitious and physically impossible to build in the area it was testified to have been built, and in the manner it was said to have been built, the defendants did build the alleged road on someone else's claims, for which they may not claim credit as assessment work on their own claims. The jury found that this road, which is alleged to have been built in 1½ days by defendant was valued at \$112.00 (Special Interrogatories). That a portion of the alleged road was built upon defendants' Cin-

der Crater 14, which would make defendants' assessment work for Cinder Crater 14 for the assessment year ending July 1, 1949, and determines whether or not Cinder Crater 13 was valid or not at the time Red Robin claim of plaintiffs was located by plaintiffs. It is apparent that \$112.00 worth of assessment work is not sufficient work for three claims that defendants claim, when the said claims are not contiguous. The area in which defendants claim to have built the alleged road is an area where there are large volcanic rock formations, which would be a physical impossibility for defendants to build such a road in the manner they described; that once a road is made it is ascertainable for many years afterward for the reason that the top soil is disturbed and the brush will not grow back, leaving it free from brush; that a person could not even ride a horse through that area, let alone drive a tractor (Tr. 318, 320, 325). There never was a road in the area that defendants illustrated on Defendants' Exhibit 11 on that portion of the road allegedly built on defendants' Cinder Crater 14 (Tr. 352, proposed exhibit of surveyor's map, which was not allowed in evidence, Tr. 34, Tr. 343).

There was no evidence of a road on plaintiffs' Drake No. 1 and Drake No. 8, as described by defendants on Defendants' Exhibit No. 11 (Plaintiffs' Exhibit No. 29) which is the area that defendant alleges road was built clearly discloses that there was no road there at the time plaintiffs worked this area, and that defendants did not strip the overburden off the area he testified to, to-wit, the southeast corner of Drake No. 1. See also the surveyor's map which court refused to allow jury to see or take to the jury room.

Plaintiffs' Exhibit 27 clearly illustrates that it was

plaintiff who stripped the overburden off; the tracks are those of the plaintiff's tractor in the photograph.

The defendants testified that they removed overburden in the southeast corner of Drake No. 1 for their assessment work for July 1, 1951, to July 1, 1952 (Tr. 229). Plaintiffs' Exhibit No. 29 clearly illustrates that the overburden in the southwest corner of Drake No. 1 was not stripped as defendants testified; that at the time plaintiffs commenced work in 1956 in this area, it was not disturbed by defendants or anyone else. Surveyor's map not admitted illustrates no such work as described by defendants in southwest corner of Drake No. 1.

At a hearing for a preliminary injunction, held May 8, 1956, the defendant Ralph Memmott testified that he knew the plaintiff Mr. Utley had a claim known as Drake No. 3 at the time he top filed this claim with his claim known as Black Lava No. 1, which he located April 2, 1956, after suit commenced. The excuse used by defendant Ralph Memmott was that he checked the records to see if he could locate the claim by the records; then if he couldn't he would top file the claim; that if there was nothing on the records to satisfy him, he would then proceed to file (Pg. 68, 69, 70, 71, Transcript of the Preliminary Hearing). Yet the defendant Ralph Memmott had actual knowledge of this claim and where it was located; and the lower court so found (see Memorandum Decision Par. 5). It is apparent from the record that defendants habitually jump claims whenever he is not satisfied with the public record, and with no regard to the actual or physical condition of the claims with reference to work done or staking; they rely entirely upon the lack of a surveyed description of record, not by physical inspection of the property. Whenever Mr. Ralph Mem-

mott sees that someone has located a sizeable deposit of cinders, he immediately goes to the record to see if it satisfies him as to its proper location. If the record does not satisfy him, he then jumps the claim by filing for record. He admits that the only knowledge he has is that of record; without any regard as to what he knows by a physical inspection. There is no valid claim until it is recorded, in the opinion of Mr. Memmott (Tr. 275). During the deposition of Mr. Ralph Memmott, taken in April, 1956, he specifically admitted that he did not claim any interest in the plaintiffs' claim Drake No. 3, as was illustrated on defendants' map then before him at that time (Tr. 270).

At the several pre-trials held on this case, the purpose was an attempt to simplify the issues and to limit them. At these pre-trials and depositions it was determined that two of the claims, Red Robin A and Drake No. 3, belonging to plaintiffs, would not be issues for the reason that defendants then had no valid interest in said claims. Since commencement of suit defendants jumped both of these claims, and brought them right back into issue, and by so doing succeeded in confusing and increasing the heretofore simplified issues. This certainly defeats the purpose of the pre-trial procedure.

There was a conflict in the evidence as to which of the parties performed the annual labor on the claims in issue, and the places where the work was claimed to have been done. But the vast preponderance of the evidence was in favor of the plaintiffs and against the defendants. The only witness the defendants produced was one of the defendants himself, Mr. Ralph Memmott, who is a vitally interested party. The plaintiffs produced disinterested witnesses who had no interest in the outcome of the trial, to

wit: Mr. A. R. Shelton, a registered surveyor and mining engineer; Mr. Culbert Robison, a police officer for the city of Fillmore, Utah; Mr. Lowell Peterson, a garage mechanic and truck driver, together with interested parties such as Mr. George H. Stevens, Mr. VonUtley, and Mrs. Von Utley, all of whom are parties to this action.

There are a number of discrepancies of defendant's testimony. He relates in the Hearing for a Preliminary Injunction that he shipped cinders from his Cinder Crater No. 14, and has not shipped from Cinder Crater No. 5 (Page 20 of said Transcript). On the deposition of Mr. Ralph Memmott, he testified that he had not shipped cinders from either Cinder Crater No. 13 or No. 14, but did ship several loads from Cinder Crater No. 5 (Page 12 and 13 of his Deposition).

Mr. Memmott testified at the trial that Mr. Utley was mining in the area in which defendant had removed the overburden from (Tr. 236). Plaintiffs' Exhibit 29 clearly shows that the spot which plaintiff has now mined in Drake No. 1 and No. 8, was not stripped as Mr. Memmott testified it was. This photograph was taken prior to the time the same area was mined by plaintiffs. Plaintiffs submit that defendant Mr. Ralph Memmott is guilty of perjurying his testimony before this Court on these matters, and should not be allowed to prevail on any issues by reason of the said perjury.

In addition to the above perjured testimony, Mr. Ralph Memmott testified that on his deposition that his Cinder Crater claims No. 13 and No. 14 are both contiguous (Page 10, Memmott Deposition). That the record clearly shows that Mr. Memmott did not own the vast majority of the alleged Cinder Crater No. 13 claim, for the reason that it

had always belonged to another party, and the defendants' Cinder Crater claims No. 13 and No. 14 have never been contiguous (Tr. 263, 264).

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN ALLOWING DEFENDANTS TO AMEND THEIR SECOND AMENDED ANSWER AND COUNTERCLAIM SO AS TO BRING BEFORE THE JURY THE ISSUE OF PLAINTIFFS' CLAIM RED ROBIN A WHICH HAD PREVIOUSLY BEEN ADMITTED VALID IN PRE-TRIAL; BY REASON OF DEFENDANTS' TOP FILING PLAINTIFFS' RED ROBIN A AFTER SUIT HAD COMMENCED; RIGHTS TO BE DETERMINED WERE THE RIGHTS THAT EXISTED AT TIME SUIT WAS COMMENCED.

POINT II

THE COURT ERRED IN ALLOWING DEFENDANTS TO AMEND THEIR SECOND AMENDED ANSWER AND COUNTERCLAIM TO BRING BEFORE THE COURT THE ISSUE OF PLAINTIFFS' CLAIM DRAKE NO. 3 AND DEFENDANTS' CLAIM BLACK LAVA NO. 1 WHICH WAS LOCATED BY DEFENDANTS ON TOP OF PLAINTIFFS' CLAIM AFTER THE LAW SUIT WAS COMMENCED AND WHEN DEFENDANTS HAD ACTUAL KNOWLEDGE OF PLAINTIFFS' VALID CLAIM.

POINT III

THE COURT ERRED IN REFUSING PLAINTIFFS' MOTION TO AMEND THE PRE-TRIAL ORDER AND

PLAINTIFFS' AMENDED COMPLAINT TO PUT BEFORE THE COURT AND JURY THE ISSUE OF THE PHYSICAL LOCATION OF THE BLACK DRAGON NO. 5 MINING CLAIM; THAT IT WAS IN FORCE AND EFFECT AT THE TIME DEFENDANTS LOCATED THEIR CINDER CRATER NO. 14 CLAIM; THAT CINDER CRATER NO. 14 WAS THEREFORE INVALID AT THE TIME PLAINTIFFS LOCATED THEIR DRAKE NO. 1 AND NO. 8. THE COURT ERRED IN FAILING TO MAKE A FINDING OF FACT AS TO THE PHYSICAL LOCATION OF BLACK DRAGON NO. 5 AND THAT THE UNCONTROVERTED EVIDENCE WAS TO THE EFFECT THAT BLACK DRAGON NO. 5 WAS THE SAME PHYSICAL LOCATION OF CINDER CRATER NO. 14; THAT PLAINTIFFS' CLAIM DRAKE NO. 1 AND NO. 8 WERE VALID BECAUSE OF THE INVALIDITY OF CINDER CRATER NO. 14.

POINT IV

THE COURT ERRED IN ITS FAILURE TO INSTRUCT JURY UPON THE UNCONTROVERTED EVIDENCE THAT THERE WAS SUFFICIENT LABOR PERFORMED ON PLAINTIFFS' CLAIM RED ROBIN A DURING THE SPRING OF 1956, PRIOR TO THE LOCATION OF DEFENDANTS' CLAIM RED HILL NO. 1.

POINT V

THE COURT ERRED IN REFUSING TO ALLOW INTO EVIDENCE AS AN EXHIBIT THE SURVEYOR'S MAP MADE BY MR. A. R. SHELTON, ILLUSTRATING THE CLAIMS IN ISSUE AND THE WORKINGS AND

IMPROVEMENTS ON THE SAME CLAIMS AS OF THE DATE OF THE SURVEY. THE COURT ERRED BY UN-DUE INTERFERENCE WITH THE DIRECT EXAMINATION OF MR. A. R. SHELTON WHICH DISCREDITED THE WITNESS IN THE EYES OF THE JURY.

POINT VI

THE COURT ERRED IN RULING THAT BLACK DRAGON CLAIM NO. 6 WAS INVALID AT THE TIME DEFENDANTS LOCATED THEIR CLAIM CINDER CRATER NO. 14 BY REASON OF THE FAILURE OF THE OWNERS OF SAID BLACK DRAGON NO. 6 TO FILE AN AFFIDAVIT OF LABOR OR A NOTICE OF INTENTION TO HOLD FOR THE ASSESSMENT YEAR ENDING JULY 1, 1947, OR BETWEEN JULY 1, 1947, AND JULY 23, 1947, THE DATE OF THE LOCATION OF CINDER CRATER NO. 14 BY DEFENDANTS.

POINT VII

THE COURT IMPROPERLY REFUSED PLAINTIFFS' MOTION FOR EITHER THE COURT OR THE JURY TO VIEW THE PREMISES EITHER AS TO ALL THE CLAIMS IN DISPUTE OR AS TO CINDER CRATER NO. 13, NO. 14, DRAKE NO. 1 AND NO. 8.

POINT VIII

DEFENDANTS WILFULLY MISREPRESENTED MATERIAL FACTS RELATING TO ASSESSMENT WORK ON THE CLAIMS CINDER CRATER NO. 13 AND NO. 14; THE COURT ERRED IN FAILING TO INSTRUCT THE JURY UPON THE PREPONDERANCE

OF THE EVIDENCE IN FAVOR OF PLAINTIFFS ON THE ISSUES OF THE CLAIMS RED ROBIN A, RED ROBIN, DRAKE NO. 1 AND DRAKE NO. 8.

THE ARGUMENT

POINT I

THE COURT ERRED IN ALLOWING DEFENDANTS TO AMEND THEIR SECOND AMENDED ANSWER AND COUNTERCLAIM SO AS TO BRING BEFORE THE JURY THE ISSUE OF PLAINTIFFS' CLAIM RED ROBIN A WHICH HAD PREVIOUSLY BEEN ADMITTED VALID IN PRE-TRIAL; BY REASON OF DEFENDANTS' TOP FILING PLAINTIFFS' RED ROBIN A AFTER SUIT HAD COMMENCED; RIGHTS TO BE DETERMINED WERE THE RIGHTS THAT EXISTED AT TIME SUIT WAS COMMENCED.

One of the main functions of a Pre-Trial is to determine the issues of the case and to limit them as far as possible. The defendants conceded to plaintiffs at the first pre-trial on this case that their old Cinder Crater No. 5, which was in direct conflict with plaintiffs' Red Robin A and Red Robin, was invalid for the reason that when Cinder Crater No. 5 was located, there was a valid claim in force and effect, namely, Black Dragon No. 4 (Defendants' Exhibit No. 58).

There must be an end to the issues of a case at one time or another, and the issues should be determined as of the date of the filing of the lawsuit and the commencement of the action as between the parties to said action. In Healy vs. Rupp, 86 P. 1015, the Colorado Court ruled that in application for a patent to a mining claim, "the rights of

an adverse claimant to a mining location are limited to those existing at the time of the filing of his adverse (claim) so that he is not entitled to urge a subsequent discovery for the purpose of preventing the issuance of a patent to the applicant." On page 1017, the Colorado Court states:

"if he had no claim at the time of filing the adverse, he will not be heard to assert right to premises in dispute by virtue of one brought into existence thereafter."

78-40-4, Utah Code Annotated, 1953, is as follows:

"Termination of title pending action. If plaintiff shows right to recover at time the action was commenced, but it appears that his right has terminated during pendency of action, the verdict and judgment must be according to the fact, and plaintiff may recover damages for withholding the property."

It is clear that the Utah Legislature intended that the status quo be maintained by parties to an action during the pendency of a quiet title action. Certainly if this were not the case, there might not be an end to the controversy between the parties.

74 C. J. S. 145. Quiet Title No. 95.

"The decree must be confined to a determination and adjustment of existing rights in particular property in controversy."

In *Aluman vs. Hoofer* (Wash.) 1905, 79 P. 953, the court holds as follows:

"Where, immediately after a judgment in an action to recover possession of certain mining claims, finding that neither of the parties had any possessory rights in the claims in question, plaintiffs in that action relocated the claims, and thereafter did the re-

quired assessment work thereon, finding that such relocations were made on unoccupied public land, as required by law, was proper.”

The rights existing at the time of the commencement of the action are those that are determinative as between the parties. There was certainly lack of good faith on the part of defendants to cloud the issues and expand them after pre-trial. The uncontroverted testimony was that plaintiffs were not only doing their assessment work, (minimum of \$112.00 for Red Robin A), but that they were mining the property. Pursuant to the granting of an injunction to defendants prohibiting plaintiffs from working the claim Red Robin A, plaintiffs discontinued working this claim and moved onto their Red Robin claim. Certainly defendants are estopped from jumping plaintiffs’ claim under these circumstances.

POINT II

THE COURT ERRED IN ALLOWING DEFENDANTS TO AMEND THEIR SECOND AMENDED ANSWER AND COUNTERCLAIM TO BRING BEFORE THE COURT THE ISSUE OF PLAINTIFFS’ CLAIM DRAKE NO. 3 AND DEFENDANTS’ CLAIM BLACK LAVA NO. 1 WHICH WAS LOCATED BY DEFENDANTS ON TOP OF PLAINTIFFS’ CLAIM AFTER THE LAW SUIT WAS COMMENCED AND WHEN DEFENDANTS HAD ACTUAL KNOWLEDGE OF PLAINTIFFS’ VALID CLAIM.

Although the jury and the court rightfully awarded Drake No. 3 to the plaintiffs, it was error for the court to even allow the issue to come before the court during the trial of the case. The basis for the defendant’s claim jump-

ing was that he claimed he did not know the location of plaintiffs' claim Drake No. 3 when it was not recorded in county records in legal subdivisions. The court found that defendant had actual knowledge of Drake No. 3, its surveyed description by legal subdivisions prior to the time that defendant filed Black Lava No. 1. In fact, Mr. Ralph Memmott, defendant, is guilty of perjury on this point. He admitted he claimed no interest in Drake No. 3 (Tr. 270, 275).

The error consisted of allowing another issue before the jury which did certainly confuse the jury in the lawsuit, in that a great deal of additional evidence was required to disprove defendants' claim to Drake No. 3, and set up a condition for the jury to compromise in awarding the claims herein; that the jury compromised and gave Drake No. 3 to plaintiffs, when they were entitled to said claim unquestionably.

POINT III

THE COURT ERRED IN REFUSING PLAINTIFFS' MOTION TO AMEND THE PRE-TRIAL ORDER AND PLAINTIFFS' AMENDED COMPLAINT TO PUT BEFORE THE COURT AND JURY THE ISSUE OF THE PHYSICAL LOCATION OF THE BLACK DRAGON NO. 5 MINING CLAIM; THAT IT WAS IN FORCE AND EFFECT AT THE TIME DEFENDANTS LOCATED THEIR CINDER CRATER NO. 14 CLAIM; THAT CINDER CRATER NO. 14 WAS THEREFORE INVALID AT THE TIME PLAINTIFFS LOCATED THEIR DRAKE NO. 1 AND NO. 8. THE COURT ERRED IN FAILING TO MAKE A FINDING OF FACT AS TO THE PHYSICAL LOCATION OF BLACK DRAGON NO. 5 AND

THAT THE UNCONTROVERTED EVIDENCE WAS TO THE EFFECT THAT BLACK DRAGON NO. 5 WAS THE SAME PHYSICAL LOCATION OF CINDER CRATER NO. 14; THAT PLAINTIFFS' CLAIM DRAKE NO. 1 AND NO. 8 WERE VALID BECAUSE OF THE INVALIDITY OF CINDER CRATER NO. 14.

The mining claim Black Dragon No. 5 was located 10-28-37, and was in force and effect until 7-1-48. The description of said claim was not a surveyed description in a legal subdivision, but a metes and bounds description from a rock monument (Defendants' Exhibit 38). The physical location of this claim was vital to determine whether or not defendants' Cinder Crater No. 14 was valid, for if Black Dragon No. 5 was on the same ground as Cinder Crater No. 14 and Black Dragon No. 5 was in force and effect at the time defendants located Cinder Crater No. 14 (7-28-47), then defendants' Cinder Crater No. 14 is invalid. The uncontroverted testimony was to the effect that Black Dragon No. 5 was located on the same ground that plaintiffs located their Drake No. 1 and Drake No. 8 (Tr. 61, 90, 133, 174, 175). Mr. Shelton found original Notice of Location of Black Dragon No. 5 in monument near Southwest corner of Drake No. 1 (Tr. 61, 89, 90).

The court's reason for its refusal to allow plaintiffs' motion was because the court claimed the defendant had not had knowledge of this contention by plaintiff, and that it would be inequitable for defendants to face this issue at such a late date (Tr. 144). The defendant served Interrogatories upon plaintiffs inquiring into this issue even before pre-trial. In their Answer to the Interrogatories, plaintiffs expressly placed defendants upon notice of their con-

tention that Black Dragon No. 5 and Black Dragon No. 6 were one and the same claims. In Answer One, plaintiffs notified defendants that plaintiffs claimed title to Black Dragon No. 5 through relocation of the same claim by their claims Drake No. 1 and Drake No. 8. (See Answers to Interrogatories). On the same basis, the court allowed defendants to Amend the Pre-Trial Order and Answer and Counterclaim (Tr. 2, 3) (Tr. 294). It was certainly unjust and inequitable to allow defendants to amend at such a time and then not allow plaintiffs' Motion to Amend the Complaint and Pre-Trial Order (Tr. 140-143). It was error for the court to refuse such a vital issue as to the location of Black Dragon No. 5 and the validity of Cinder Crater No. 14 at the time of its location.

The court erred in failing to direct the jury as a matter of law that plaintiffs' Drake No. 1 and No. 8 were valid for the reason that Black Dragon No. 5 was in force and effect when defendants located Cinder Crater No. 14; that the uncontroverted evidence was to this effect.

POINT IV

THE COURT ERRED IN ITS FAILURE TO INSTRUCT JURY UPON THE UNCONTROVERTED EVIDENCE THAT THERE WAS SUFFICIENT LABOR PERFORMED ON PLAINTIFFS' CLAIM RED ROBIN A DURING THE SPRING OF 1956, PRIOR TO THE LOCATION OF DEFENDANTS' CLAIM RED HILL NO. 1.

The evidence is undisputed that plaintiffs had actual possession of their claims Red Robin and Red Robin A and had performed their assessment work for the current year at the time defendants located their Red Hill No. 1 (Tr. 111, 214, 215, 218, 349). Plaintiffs moved off Red Robin A in

1956 due to Temporary Injunction obtained by defendants and granted by the court (Temporary Injunction). Mr. Ralph Memmott admitted that he saw plaintiffs working their Red Robin A in May, 1956, and that the value of said work was worth \$32.00 (Tr. 218). Mrs. Utley's uncontradicted evidence was to the effect that a large truck and driver were hired for two days at the rate of \$40.00 per day to perform assessment work on Red Robin A, and produced a photograph of the truck used for this purpose (Plaintiffs' Exhibit 61) (Tr. 349). This made a total valuation of the assessment work for Red Robin A of \$112.00, which is uncontradicted.

Mr. Von Utley testified that he had built a ramp on Red Robin A during the spring of 1956, in order that he could load cinders from that claim and ship them (Tr. 106). That he shipped cinders from Red Robin A, one railroad car, on April 17, 1956; that he had to rebuild the first ramp after some unknown person destroyed it beyond use (Tr. 109,111). That evidently someone did not want him to work the claim and ship cinders from it. Plaintiffs moved from their mining operation on Red Robin A at the instance of the court order obtained by the defendants in May, 1956, prior to the time defendants located their Red Hill No. 1, and at a time when defendants did not have any valid claim on the property (Tr. 214, 215). The uncontradicted evidence was to the effect that during the months of February, May and June, 1956, plaintiffs performed a minimum of \$112.00 work for the annual labor of Red Robin A in addition to actually mining the claim (Tr. 218, 349) (Plaintiffs' Exhibit 61).

That pursuant to an Injunction from this Court at the request of the defendants, Mr. Utley moved off Red Robin

A and went on to Red Robin to continue working and mining (Tr. 113). Under a fact situation such as this, the defendants should certainly be estopped from claiming no work done on Red Robin A, when they were instrumental in seeing that plaintiffs moved off from Red Robin A.

The evidence is clear that more than enough work was done on Red Robin A during the spring of 1956 to comply with the legal requirements.

POINT V

THE COURT ERRED IN REFUSING TO ALLOW INTO EVIDENCE AS AN EXHIBIT THE SURVEYOR'S MAP MADE BY MR. A. R. SHELTON, ILLUSTRATING THE CLAIMS IN ISSUE AND THE WORKINGS AND IMPROVEMENTS ON THE SAME CLAIMS AS OF THE DATE OF THE SURVEY. THE COURT ERRED BY UN-DUE INTERFERENCE WITH THE DIRECT EXAMINATION OF MR. A. R. SHELTON WHICH DISCREDITED THE WITNESS IN THE EYES OF THE JURY.

Mr. A. R. Shelton, a registered surveyor and mining engineer, performed a survey of all of the plaintiffs' claims at issue before the Court October 13, 1955, and completed October 16, 1955 (Tr. 26). Mr. Shelton made a survey map upon which he drew the results of his examination of the claims at the time the survey was made, and recorded the monuments, diggings, workings, roads, and objects he observed in his thorough examination of plaintiffs' claims, and ties the claims into governmental survey in the area. He produced this map on the witness stand, and it was offered in evidence both at pre-trial and during the trial itself (Tr. 27, 34). The court refused to allow or did not

allow said survey map into evidence upon the reasoning that it kept reminding the jury of his testimony. Counsel for plaintiffs offered map into evidence before the contents of it were disclosed and after a basis of identification and authenticity was made (Tr. 34). Plaintiffs submit that such a map is certainly admissible as an exhibit. 3 Nichols Applied Evidence 2975, No. 7 is as follows:

“Maps are admissible in proper case to illustrate the testimony of a witness or as independent evidence. A map or chart may be admitted for explanatory use in connection with the testimony of a witness, although it would not be admissible as independent evidence.”

Certainly this is authority for allowing such an authenticated survey map, made by a registered surveyor and mining engineer, both as an independent exhibit and for the purpose of illustrating the testimony of the surveyor. The jury certainly could not possibly remember all of the measurements and locations of the numerous claims at issue at the trial. They were entitled to have the map to refresh their memory as to his prolonged and detailed testimony. The map expressly refutes the testimony of defendants as to where defendants performed their alleged assessment work. It expressly refutes the issue presented to the jury as to whether or not Mr. Memmott constructed that certain road for his assessment work in 1949. It expressly refutes the testimony of Mr. Ralph Memmott that he performed assessment work in the southwest corner of Drake No. 1 and No. 8 during the years 1952 and 1953; the same identical place that Mr. Von Utey had mined cinders in 1956. This was prejudicial error to plaintiffs in refusing said map as an exhibit for the use and benefit of the jury.

In the direct examination of Mr. Shelton, the licensed surveyor and mining engineer, the court interfered with the examination to the point where the jury discredited the testimony of this very important and disinterested witness. The court interrupted questions and answers posed, and led the jury to believe that the court was hostile to the witness (Tr. 29, lines 19 to 24 of Tr. 30). The court refused to allow the witness to open up the map fully for the reason that the jury might see the map (Tr. 28). All of this together did discredit the witness in the eyes of the jury.

POINT VI

THE COURT ERRED IN RULING THAT BLACK DRAGON CLAIM NO. 6 WAS INVALID AT THE TIME DEFENDANTS LOCATED THEIR CLAIM CINDER CRATER NO. 14 BY REASON OF THE FAILURE OF THE OWNERS OF SAID BLACK DRAGON NO. 6 TO FILE AN AFFIDAVIT OF LABOR OR A NOTICE OF INTENTION TO HOLD FOR THE ASSESSMENT YEAR ENDING JULY 1, 1947, OR BETWEEN JULY 1, 1947, AND JULY 23, 1947, THE DATE OF THE LOCATION OF CINDER CRATER NO. 14 BY DEFENDANTS.

The court did err if ruling as a matter of law that the ground covered by Black Dragon No. 6 became open to relocation (Drake No. 1 and Cinder Crater No. 14), for the reason that neither an affidavit of labor or a Notice of Intention to Hold for the year 1947 was filed in the Recorder's Office of Millard County, During the war years of the Second World War, and to and subsequent to the year 1947, Congress exempted mining claims from annual labor.

The apparent intention of Congress was to make those

mining claims then in force and effect valid, and to prevent their forfeiture for failure to perform annual labor during the war years to preserve the manpower of the nation and protect servicemen in the service. The Act directs that a Notice of Intention to Hold should be filed in the county in which the claim is located. Plaintiff submits that this Act of Congress is not mandatory.

To make a legislative act mandatory, there must be a forfeiture provision in the act requiring a forfeiture. This Congressional Act does not do so. There is no forfeiture provision in the Act, as there is in the Utah Statute requiring annual labor.

“It is a general rule of construction that where a legislative provision is accompanied by a penalty for a failure to observe it, the provision is mandatory.”
50 Am. Jur. 49, No. 27.

The Act of suspension provided “that every claimant of any such mining claim, in order to obtain the benefits of this act **shall** file or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian, a notice of his desire to hold said mining claim under this act”

The above act does not provide for any penalty of forfeiture in the event the Notice of Intention to Hold is not filed as is the case of the Statute providing for annual labor. As a consequence, this Congressional act is not mandatory, but is permissive.

50 Am. Jur 53, No. 32, states as follows:

“A legislative intention that the word ‘shall’, is to be construed as permissive, may appear from the spirit or purpose of the act, or from the connection in which

it is used or the relation into which it is put with other parts of the same statute."

This statutory construction rule is such that the Congressional Act suspending the work is permissive even though the word "shall" is used. It was the intention of Congress to preserve the status quo and to discontinue the necessity for work on claims. The Utah Supreme Court, in the case of Murray Hill Min. & Mill. Co. vs. Hanover, 66 P. 762, has ruled that a claim on which the required improvements have been made and labor performed is not rendered open to re-location by failure to file an affidavit of labor and improvements as required by the Utah Statute, nor will such failure impair the right of the claimant to a patent. Every reasonable doubt will be resolved in favor of the validity of a mining claim as against assertion of a forfeiture. This same analogy should be carried to the filing of a Notice of Intention to Hold; that the work was not necessary to be performed during the war years, and the mere failure to file the Notice of Intention to Hold does not forfeit a claim.

In Cain vs. Addenda Mining Co., 15 ALR 942, the Interior Department of the U. S. A. held the suspension resolution NOT MANDATORY.

In Donoghue v. Tonopah Oriental Min. Co., Nevada, 198 P. 553, 15 ALR 937, held that the failure to file notice of intention to take advantage of the resolution of Congress of 10-5-17, suspending assessment work on mining claims during the war, in the office where location notice was filed as required by the proviso of the Act, because of uncertainty as to County line and advice of County Officials that it should be filed in another county, where it was in fact filed,

does not render the claim subject to relocation by another claimant; that where statute is susceptible of two interpretations, that one will be given it which best comports with reason and justice; that equity never enforces forfeitures, nor extends its aid in the assertion of a mere legal right contrary to clear equity and justice of the case; that there is no forfeiture where there is no fraud or deceit, no intention to abandon, good faith and honest effort to comply, and excusable neglect, not attributed to owner.

This case clearly illustrates that the filing of the Notice of Intention to Hold is not mandatory and does not create a forfeiture, Plaintiffs submit; that the above elements for excusable neglect to file the Notice of Intention to Hold prevails in the instant case; that Black Dragon No. 5 and No. 6 were overlapping claims, and Black Dragon No. 6 included Black Dragon No. 5, at least as far as the amendment to Black Dragon No. 6 is concerned, which was done prior to the location of Cinder Crater No. 14 by defendants; that Notice of Intention to Hold Black Dragon No. 5 was in fact filed which was for both Black Dragon No. 5 and Black Dragon No. 6. Certainly this is one of the exceptions that the authorities do and should recognize in the failure of owners to file Notice of Intention to Hold on Black Dragon No. 6.

In the case of Morgan vs. Sorenson, 286 P2d 229, Utah, 1955, this Court discussed the aim of the assessment requirement in that it was to develop the mineral resources and encourage the mining of claims. In the instant case, it has been the plaintiffs that have been doing the mining and developing the resources. The plaintiffs have developed and mined their Drake No. 1 and No. 8 during the five years they have held the claim, while the defendants have

not mined or developed their Cinder Crater No. 13 or No. 14 claims in the ten years they have claimed them; the purpose of the law will be upheld by quieting title in the claims to plaintiffs, because plaintiffs have done and will continue to mine and develop these resources.

In 15 ALR 942, the case of Royston vs. Miller is cited as follows:

"The suspension of the provisions of the statute requiring annual work to be done necessarily **SUSPENDED THE RIGHT OF FORFEITURE**. The forfeiture imposed by the statute was for failing to do the work which the law then required to be done.

"The suspensatory or amendatory act provided that the work hitherto required need not be done in [1893], and hence it follows that the right of forfeiture could not thereafter exist for any act omitted in that respect during that year. **THE ENFORCEMENT OF A FORFEITURE CANNOT BE HAD WHEN THE LAW EXCUSES THE PERFORMANCE OF THAT CONDITION.**"

The above clearly establishes the fact that these moratorium acts were intended to do away with the forfeiture provision in the law requiring the forfeiture of claims when annual work was not done. That the moratorium act for the year 1947 does not provide for a forfeiture of the claims in the event the Notice of Intention to Hold is not filed; hence the statute is not mandatory, but permissive and directory. The claim Black Dragon No. 6 was not forfeited for the reason that a Notice of Intention to Hold was not filed under its name just prior to the time defendants located Cinder Crater No. 14. Actually, a Notice of Intention to Hold was filed for Black Dragon No. 5 and No. 6

to 7-1-48; for the two claims at that time were merged into one another and the Notice To Hold was filed in the name of Black Dragon No. 5.

POINT VII

THE COURT IMPROPERLY REFUSED PLAINTIFFS' MOTION FOR EITHER THE COURT OR THE JURY TO VIEW THE PREMISES EITHER AS TO ALL THE CLAIMS IN DISPUTE OR AS TO CINDER CRATER NO. 13, NO. 14, DRAKE NO. 1 AND NO. 8.

Under Rule 47(j) of the Utah Rules of Civil Procedure, the jury may be allowed to view the property which is the subject of litigation when in the opinion of the court it is proper for the jury to view the premises. Plaintiffs admit that this is within the discretion of the Court as to whether or not the jury or the Court should view the premises. In the case of P. A. Sorenson Co. vs. Denver & R. G. R. Co., Utah, 164 P. 1020, the Supreme Court of Utah states that the purpose of a view of the premises is to enable the jury to better understand and more fully appreciate the evidence produced in open court, and is not for the purpose of taking independent evidence. Plaintiffs submit that a view in the instant case would have clarified a number of the issues before the jury when there were so many claims involved; that they could have determined by physical inspection whether or not the defendants could have constructed that certain road across Cinder Crater No. 14 and No. 13; that one look at the terrain would have convinced them that it would be impossible for the defendant to have constructed such a road in the time he testified he did (1½ days) across impassable terrain even for a horse. The jury was defi-

nately confused with the original issues and the additional issues defendants created during the course of the trial. A view of the premises for this purpose alone would have dispelled this one issue alone in favor of plaintiffs and would have proven beyond any doubt that Mr. Ralph Memmott had perjured himself before the court, and that the jury would then have resolved a minimum of one of the Special Interrogatories submitted to them in favor of the plaintiffs, but which they did not do so, to-wit: Was the road constructed by defendant and the amount which the road cost. It would have been impracticable to disprove this fictitious road any other way, except by testimony and a view of the premises.

53 Am. Jur. 315, No. 442:

“A view should not be granted unless it appears to be reasonably certain or the court is satisfied that it will be some aid to the jury in reaching their verdict, and further, that it is distinctly impracticable and inefficient to present the material elements to them by photographs, diagrams, maps, measurements, and the like.”

If the court felt that it was too cumbersome to take the jury there, the court itself could have viewed the premises quickly and efficiently and determined once and for all whether Mr. Ralph Memmott had actually constructed the road he drew in red pencil across Defendants' Exhibit No. 11.

The defendants objected to such a view, and apparently they were afraid of the results of such an inspection.

Plaintiffs submit that this was a case in which the court abused its discretion in refusing to allow a view of the premises.

POINT VIII

DEFENDANTS WILFULLY MISREPRESENTED MATERIAL FACTS RELATING TO ASSESSMENT WORK ON THE CLAIMS CINDER CRATER NO. 13 AND NO. 14; THE COURT ERRED IN FAILING TO INSTRUCT THE JURY UPON THE PREPONDERANCE OF THE EVIDENCE IN FAVOR OF PLAINTIFFS ON THE ISSUES OF THE CLAIMS RED ROBIN A, RED ROBIN, DRAKE NO. 1 AND DRAKE NO. 8.

The record is replete with intentional discrepancies in the testimony of Mr. Ralph Memmott. At a hearing for a preliminary injunction he stated that he had mined and shipped cinders from his Cinder Crater No. 14, and that he has not mined and shipped cinders from Cinder Crater No. 5 (Page 20 of that transcript). On his deposition, Mr. Memmott testified that he had not shipped cinders from either Cinder Crater No. 13 or No. 14, but did ship from Cinder Crater No. 5 (Pages 12, 13 of deposition).

Mr. Memmott testified at the trial that Mr. Utley was mining in the spot on Drake No. 1 and No. 8, in the southwest corner, where defendant had performed some of his assessment work in 1952 and 1953, removing overburden (Tr. 236). Plaintiffs' Exhibit No. 29 clearly shows that the spot which plaintiff has now mined there was not stripped by defendant as he described it, or at all, by anyone prior to the time that plaintiffs stripped the overburden off and mined it. This photograph was taken prior to the time the same area was mined by plaintiffs. Mr. Shelton's survey map, which was offered but not admitted in evidence, clearly illustrates that there was no overburden stripped from this area in 1955 when he surveyed the claims

and made the map; Mr. Shelton so testified. Mr. Lowell Peterson, the truck driver, testified that the same spot had not been stripped as described by Mr. Memmott at a time when Mr. Peterson drove there to haul some cinders away from those claims for Mr. Uteley.

The red line on defendants' Exhibit 11, indicating a road Mr. Memmott allegedly built in 1949, is not disclosed on the survey map of Mr. Shelton (Tr. 34, 343). Mr. Lowell Peterson and Mr. Culbert Robison, the policeman, both testified that there was no such road on Drake No. 8 and that it would be physically impossible to build such a road in that area and in the time defendant alleged he built it (Tr. 318, 320, 325, 352). A view of the premises would have conclusively proved the road to be fictitious in the area it was drawn and the time and manner it was allegedly built.

Mr. Memmott testified that he did not know the whereabouts or the existence of Drake No. 3 at the time he jumped this claim and filed his Black Lava No. 1 claim after this lawsuit had been commenced. The court found in its Judgment and Findings of Fact and Law that Mr. Memmott had actual knowledge of plaintiffs' Drake No. 3, both as to its location and existence.

Mr. Memmott testified on his deposition that his Cinder Crater claims No. 13 and No. 14 were both contiguous (Page 10, Memmott Deposition). The record clearly shows that Mr. Memmott did not own the vast majority of the alleged Cinder Crater No. 13 for the reason that it had always belonged to another party (Tr. 263, 264).

It is clear at this point that Mr. Ralph Memmott has wilfully misrepresented the above facts. That, in effect, he has purjured himself on the above points. He should

not be allowed to prevail on any issues based upon his misrepresented evidence.

There is a conflict in the evidence as to which of the parties performed the annual labor on claims in issue and the places where the work was claimed to have been done. But the vast preponderance of the evidence is in favor of the plaintiffs and against the defendants. The only witness the defendants produced was one of the defendants himself, Mr. Ralph Memmott, who is a vitally interested party. The plaintiffs produced disinterested witnesses who had no interest in the outcome of the trial, to-wit: Mr. A. R. Shelton, a registered surveyor and mining engineer; Mr. Culbert Robison, a police officer for the city of Fillmore, Utah; Mr. Lowell Peterson, a garage mechanic and truck driver, together with interested parties such as Mr. George H. Stevens, Mr. and Mrs. Von Utley, all of whom are parties to this action.

In view of this vast preponderance of evidence in favor of the plaintiffs, the court should have pointed out and instructed the jury such a preponderance of the evidence. By reason of the intentional clouding and multiplying of the issues on the part of the defendant after suit was commenced, and the above mentionad wilful misrepresentations made by defendant, Mr. Ralph Memmott, the issues on appeal should now be resolved in favor of the plaintiff as to the plaintiffs' claims Red Robin A, Red Robin, Drake No. 1 and No. 8.

CONCLUSION

The court erred in allowing defendants to top file plaintiffs' Red Robin A and Drake No. 3 claims after suit was commenced, to amend the pre-trial order and the pleading

just prior to trial, and thus increase the already numerous issues before the court, which thoroughly confused the jury. The parties' rights should have been determined as they existed at the time of the commencement of the suit as between the parties. Defendants top filed plaintiffs' Drake No. 3 after suit commenced and pending trial and with full and actual knowledge of the existence and location of the said claim of plaintiffs.

The court erred in refusing plaintiffs' motion to include as an issue of the physical location of Black Dragon No. 5 claim which bore directly on the validity of defendants' claim Cinder Crater No. 14. The evidence conclusively proved that Black Dragon No. 5 and plaintiffs' Drake No. 1 were one and the same location; that in fact plaintiffs used the original monument of Black Dragon No. 5 in the location of Drake No. 1. That as a result, defendants' Cinder Crater No. 14 was invalid at the time plaintiffs located Drake No. 1, for the reason that Black Dragon No. 5 was in force and effect at the time Cinder Crater No. 14 was located.

The court erred in failing to instruct the jury as to the sufficiency of the labor performed by plaintiffs on Red Robin A during the spring of 1956, prior to the location of defendants' Red Hill No. 1, after commencement of the suit. That the uncontroverted evidence was to the effect that a minimum of \$112.00 was done in spring of 1956 and in addition a mining operation on said claim; that plaintiffs discontinued further mining operations on Red Robin A just immediately prior to the location of defendants' Red Hill No. 1 by reason of an injunction to prevent plaintiffs from mining said Red Robin A and obtained by defendants.

Defendants are estopped from asserting their Red Hill No. 1.

The court erred in failing and refusing to allow Mr. Shelton's survey map into evidence to illustrate the physical condition of the claims in issue at the time survey was made. That said map refutes much of the testimony of defendants concerning assessment work allegedly performed by defendants. That said map would aid jury in determining the issues and clarify some of the testimony. That said map is certainly admissible in evidence.

The court erred in ruling that it is necessary under the Congressional Moratorium Act for the year 1947 that it is necessary to file Notice of Intention to Hold in order to prevent a forfeiture of the claim when no work is done. The Act is not mandatory for the reason that it provides for no forfeiture. The Act relieved the forfeiture provision for failure to do assessment work annually. The courts abhor a forfeiture. A Notice of Intention to Hold was filed for Black Dragon No. 5, which was part of the amended Black Dragon No. 6 for the time at issue, when defendants located Cinder Crater No. 14. That the Notice of Intention to Hold for Black Dragon No. 5 was good for Black Dragon No. 6.

The court abused its discretion in failing to allow a view of the premises to the jury or the court itself certainly as to the issue presented to the jury as to the existence of a fictitious road built by defendants across Cinder Crater No. 13 and No. 14 in 1949. The view would certainly have clarified the existence or non-existence of the road, and simplified the issues in this respect.

The court erred in failing to instruct the jury as to the vast preponderance of the evidence in favor of the plain-

tiffs on the issues by reason of the strong testimony of many disinterested witnesses.

the defendants wilfully misrepresented material facts as to assessment work on their claims Cinder Crater No. 13 and No. 14. The record conclusively proves that Mr. Ralph Memmott has contradicted himself on numerous occasions and wilfully misrepresented that he did not know of the existence or whereabouts of plaintiffs' claim Drake No. 3, when in fact Mr. Memmott had actual knowledge of its whereabouts and existence. The voice of justice and equity cries out that such a perjured testimony should not be allowed to prevail in a Court of Justice.

Respectfully submitted,

THOMAS S. TAYLOR,
Attorney for Plaintiffs
and Appellants,
55 East Center St.,
Provo, Utah